

Decision: **PROPOSED DECISION OF ALJ PARK (Mailed 2/12/2016)**

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Marz Garcia,

Complainant,

vs.

California Water Service Company
(U60W),

Defendant.

Case 15-09-002
(Filed September 8, 2015)

DECISION DISMISSING COMPLAINT**Summary**

The complaint of Marz Garcia is dismissed because it fails to state a claim that California Water Service Company violated any provision of law or any order or rule of the California Public Utilities Commission. This proceeding is closed.

1. Procedural History

On September 8, 2015, Marz Garcia filed a complaint seeking relief from California Water Service Company (Cal Water)'s requirement that he install a backflow prevention device due to the presence of a fresh water supply from a well on his residential property.

Cal Water timely filed an answer on October 19, 2015. Cal Water's answer requested that the California Public Utilities Commission (Commission) dismiss the complaint.

The assigned Administrative Law Judge (ALJ) held a prehearing conference (PHC) on November 2, 2015, to discuss the potential issues and schedule of the proceeding. At the PHC, the assigned ALJ directed that Cal Water must file a Motion to Dismiss pursuant to Rules 11.1 and 11.2 of the Commission's Rules of Practice and Procedure in order to have the Commission consider any request for dismissal.

On November 24, 2015, the assigned Commissioner issued a Scoping Memorandum and Ruling (Scoping Memo), which set forth the procedural schedule and addressed the scope of the proceeding.

Pursuant to the schedule set forth in the Scoping Memo, Cal Water filed a Motion to Dismiss the complaint on December 15, 2015. Garcia timely served but did not file a response to the Motion to Dismiss on December 30, 2015.

On February 4, 2016, Garcia filed a motion requesting that the late filing of his response be accepted. On February 8, 2016, the assigned ALJ issued a ruling granting Garcia's motion.

2. Discussion

2.1. Standard for Motion to Dismiss

The Commission's jurisdiction to adjudicate complaints is set by Public Utilities Code Section 1702, which requires that the complaint set forth "any act or thing done or omitted to be done by any public utility ... in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission."

As the Commission recently explained in Decision (D.) 12-07-005 (at 5-8), it has employed two standards for evaluating a Motion to Dismiss a complaint. One is akin to the standard for a Motion to Dismiss or a demurrer in a civil court; the other is akin to the standard for a motion for summary judgment in court. The first asks “whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law.” (D.99-11-023 at 7, 3 Cal.P.U.C.3d 297, 301; *see also* D.12-03-037 at 7.) The second requires “that the moving party must prevail based solely on undisputed facts and matters of law.” (D.04-05-006 at 8.) On either standard, the result in this case is the same.

2.2. Analysis of Motion to Dismiss

Cal Water’s Motion to Dismiss asserts that the complaint should be dismissed based on undisputed facts and matters of law. Cal Water claims that pursuant to its Tariff Rule 16C, it is authorized to require installation of a backflow prevention device based on the mere fact that there is a well on a residential property and that it is not required to submit additional proof of potential for cross-connection.

The requirements in Cal Water’s Tariff Rule 16C are intended to protect the health and safety of the public by preventing actual or potential contamination of the public water supply. Rule 16C(2) governs when Cal Water will require backflow prevention assemblies. Generally, this rule requires the utility to conduct an evaluation of the degree of potential health hazard to the public water supply. However, Rule 16C(2) permits the utility to forego a complete evaluation under certain conditions. The rule states:

Notwithstanding the above, because certain activities present inherent risks to the water supply, the utility may forego a complete evaluation and may require backflow protection based on the type of facility or nature of water use, if certain conditions are present. Customers that are required to install a backflow prevention assembly under these circumstances will be provided with an internal cross connection inspection upon request. The conditions under which [Cal Water] will require the installation of approved backflow prevention assembly(ies) of required type include, but are not limited to, those listed below.

One of the specified conditions where a complete evaluation is not required is the following:

Where a fresh water supply which has not been approved by the State Department of Public Health is already available from a well, spring, reservoir or other source. (If the customer agrees to destroy this other supply and agrees to remove all pumps and piping necessary for the utilization of an auxiliary supply, the installation of backflow prevention assembly(ies) will not be required.)

(Cal Water Tariff Rule 16C(2)(a).)

Rule 16C(2)(a) authorizes Cal Water to require a customer to install a backflow prevention assembly based on the mere fact that there is a fresh water supply from a well, unless the fresh water supply has been approved by the appropriate public health agency¹ or destroyed. Pursuant to this rule, the mere presence of a fresh water supply from an unapproved well constitutes an inherent risk to the public water supply. Therefore, once Cal Water confirms the presence of an unapproved or undestroyed well, it is not required to make any

¹ Cal Water's Rule 16C(2)(a) refers to the State Department of Public Health. According to Cal Water, the Division of Drinking Water within the State Water Resources Control Board now has authority to enforce regulations for cross-connection control. (Motion to Dismiss at 2.)

further demonstration that there is likely to be a connection to its water supply prior to requiring a backflow prevention assembly.²

It is undisputed that Garcia has a fresh water supply from a well on his residential property. This well has not been destroyed and is currently in use. (See Response to Motion to Dismiss at 6.) Garcia does not contend that this well has been approved by the appropriate public health agency. (See Cal Water Tariff Rule 16C(2)(a); Cal. Code Regs., tit. 17, § 7585, subd. (b).) Once Cal Water confirmed that there was a well on Garcia's property,³ it properly applied Rule 16 in requiring Garcia to either install a backflow prevention assembly or to destroy the well.

Rule 16 is binding on Cal Water and its customers, including Garcia. A utility tariff filed with the Commission has the force and effect of a statute. (*Dyke Water Company v. Public Utilities Com.* (1961) 56 Cal.2d 105, 123.) Cal Water's Rule 16 has been duly filed with the Commission. There are no allegations in the complaint to the contrary.

² Garcia requests that the Commission take judicial notice that an unconnected well cannot possibly contaminate a public water supply whereas a household that uses the public water supply to irrigate vegetation can be a source of contamination. (Response to Motion to Dismiss at 4.) The request for judicial notice is denied. Garcia fails to provide any justification for his request for judicial notice. (See Cal. Code Regs., tit. 20, § 13.9; see also Evid. Code, §§ 450 et seq.) Moreover, according to Cal Water's Tariff Rule 16C(2), the presence of an unapproved or undestroyed well presents an inherent risk to the public water supply. To the extent that Garcia attempts to relitigate the propriety of the rule, that issue is outside the scope of this complaint proceeding.

³ According to Garcia, he informed a Cal Water Cross Connection Specialist that an unconnected well existed on his property during a site visit to the Garcia property in June 2014. (Response to Motion to Dismiss at 2; see also Motion to Dismiss at 5.)

Garcia claims that Rule 16C(2)(a) came into being without actual notice to Garcia after Garcia notified Cal Water of his objection to the installation of a backflow prevention assembly. (Response to Motion to Dismiss at 1 & 4.) The Commission approved modifications to Tariff Rule 16 in D.14-08-011 in Cal Water's recent General Rate Case (GRC), Application 12-07-007. Garcia's complaint does not allege that Cal Water violated any notice requirements or otherwise failed to follow the proper procedures during its GRC or in filing the advice letter that modified Rule 16C. In any case, D.14-08-011 is now a final and unappealable Commission decision and Garcia may not challenge that decision's findings in his complaint. (Pub. Util. Code, §§ 1709 & 1731.)

Moreover, the rule stated in the current version of Rule 16C(2)(a) is not a new requirement. In Resolution W-3477, dated January 9, 1990, the Commission required water utilities, including Cal Water, to include in their tariffs the rule that the utility will require the installation of approved backflow preventers of required type whenever a customer's premises has a fresh water supply from a well, spring, reservoir, or other source that has not been approved by the appropriate public health agency unless the customer agrees to abandon the other supply and remove all pumps and piping necessary for the use of the other supply. (Resolution W-3477, Ordering Paragraph 1 and Appendix A, Rule 16C(2)(a).)⁴

Lastly, we do not find Cal Water's Tariff Rule 16C(2)(a) to be inconsistent with Section 7585 of Title 17 of the California Code of Regulations, which governs a water supplier's evaluation of potential health hazards to the public water

supply.⁵ Rather, the Commission originally approved Rule 16C(2)(a) in order to implement the requirements of Section 7585. (*See* Resolution W-3477, Findings 1 & 2.) Consistent with Section 7585(b), Rule 16C(2)(a) gives “special consideration” to premises having an auxiliary water supply.

As described above, the complaint fails to allege any facts that demonstrate that Cal Water violated any provision of law or any order or rule of the Commission. (*See* Pub. Util. Code, § 1702.) Based on the undisputed facts in this case, Cal Water complied with the terms of its duly filed tariff. Therefore, Cal Water is entitled to judgment as a matter of law and the complaint is dismissed.

3. Categorization and Need for Hearing

The categorization of this proceeding is adjudicatory. The Commission preliminarily determined that this proceeding would require evidentiary hearings. But because this proceeding is resolved on the basis of the Motion to Dismiss, no evidentiary hearings are necessary and none were held. The preliminary determination that hearings are necessary is changed to “No hearings are necessary.”

⁴ A copy of Resolution W-3477 can be found at:

ftp://ftp2.cpuc.ca.gov/LegacyCPUCDecisionsAndResolutions/Resolutions/W3477_19900109.pdf

⁵ Section 7585 of Title 17 of the California Code of Regulations states, in relevant part:

The water supplier shall evaluate the degree of potential health hazard to the public water supply which may be created as a result of conditions existing on a user’s premises. ... Special consideration shall be given to the premises of the following types of users: ...

(b) Premises having an auxiliary water supply, unless the auxiliary supply is accepted as an additional source by the water supplier and is approved by the health agency.

4. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. No comments to the proposed decision were filed.

5. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and Sophia J. Park is the assigned ALJ in this proceeding.

Findings of Fact

1. It is undisputed that the complainant has a fresh water supply from a well on his residential property.
2. There is no dispute that Cal Water's Tariff Rule 16 has been duly filed with the Commission and is in effect.
3. No evidentiary hearing is necessary in this proceeding and none was held.

Conclusions of Law

1. A utility tariff filed with the Commission and in effect has the force and effect of a statute.
2. Cal Water's Tariff Rule 16C(2)(a) directs Cal Water to require the installation of a backflow prevention assembly where there is a fresh water supply from a well, unless the fresh water supply has been approved by the appropriate public health agency or destroyed.
3. Cal Water's Tariff Rule 16C(2)(a) implements the requirements of Section 7585 of Title 17 of the California Code of Regulations.
4. The complaint fails to allege sufficient facts to support a conclusion that Cal Water violated any provision of law or any order or rule of the Commission.

5. The undisputed facts and relevant law support a conclusion that Cal Water has not violated any provision of law or any order or rule of the Commission with respect to the actions alleged in the complaint.

6. The complaint should be dismissed.

O R D E R

IT IS ORDERED that:

1. The complaint filed by Marz Garcia against California Water Service Company on September 8, 2015 is dismissed.

2. No evidentiary hearings are necessary.

3. Case 15-09-002 is closed.

This order is effective today.

Dated _____, at San Francisco, California.